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July 16, 2018

Joshua Wayland
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

RE: STB Docket No. FD 36186, Texas Railway Exchange-Construction and Operation; Galveston County, Texas

Dear Mr. Wayland:

Texas Parks and Wildlife Department (TPWD) has received and reviewed the submitted documentation regarding the above-referenced proposed rail line project.

Please be aware that a written response to a TPWD recommendation or informational comment received by a state governmental agency may be required by state law. For further guidance, see the Texas Parks and Wildlife Code, Section 12.0011. For tracking purposes, please refer to TPWD project number 40329 in any return correspondence regarding this project.

Project Description

The Project involves the construction and operation of a new rail line. The proposed rail line would be approximately 2,600 feet in length and would provide a rail connection between the Texas International Terminals and an existing rail line owned and operated by BNSF Railway Company.

TPWD offers the following comments and recommendations concerning this project.

General Construction Recommendations

Recommendation: TPWD recommends consolidating work and staging areas within previously disturbed habitat, such as established right-of-way (ROW).

Recommendation: TPWD recommends the judicious use and placement of sediment control fence to exclude wildlife from the construction area. In many cases, sediment control fence placement for the purposes of controlling erosion and protecting water quality can be modified minimally to also provide the benefit of excluding wildlife access to construction areas. The exclusion fence should be buried at least six inches and be at least 24 inches high. The exclusion fence should be maintained for the life of the project

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and only removed after the construction is completed and the disturbed site has been revegetated. Construction personnel should be encouraged to examine the inside of the exclusion area daily to determine if any wildlife species have been trapped inside the area of impact and provide safe egress opportunities prior to initiation of construction activities.

Recommendation: For soil stabilization and/or revegetation of disturbed areas within the proposed project area, TPWD recommends erosion and seed/mulch stabilization materials that avoid entanglement hazards to snakes and other wildlife species. Because the mesh found in many erosion control blankets or mats pose an entanglement hazard to wildlife TPWD recommends the use of no-till drilling, hydromulching and/or hydroseeding rather than erosion control blankets or mats due to a reduced risk to wildlife. If erosion control blankets or mats will be used, the product should contain no netting or contain loosely woven, natural fiber netting in which the mesh design allows the threads to move, therefore allowing expansion of the mesh openings. Plastic mesh matting should be avoided.

Federal Laws

Migratory Bird Treaty Act

The Migratory Bird Treaty Act (MBTA) prohibits direct and affirmative purposeful action that reduce migratory birds, their eggs, or their nests, by killing or capturing, to human control, except when specifically authorized by the Department of the Interior. This protection applies to most native bird species, including ground nesting species. The U.S. Fish and Wildlife Service (USFWS) Migratory Bird Office can be contacted at (505) 248-7882 for more information on potential impacts to migratory birds.

Recommendation: If migratory bird species are found nesting on or adjacent to the project area, they must be dealt with in a manner consistent with the MBTA. TPWD recommends excluding vegetation clearing activities during the general bird nesting season, March 15th through September 15th, to avoid adverse impacts to this group. If clearing vegetation during the migratory bird nesting season is unavoidable, TPWD recommends the project proponent survey the area proposed for disturbance to ensure that no nests with eggs or young will be disturbed by operations. If nests are observed during surveys, an area of buffer vegetation no less than 25 feet in all directions should remain around the nest until young have fledged.

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Federal Law: Endangered Species Act

Federally-listed animal species and their habitat are protected from take on any property by the Endangered Species Act (ESA). Take of a federally-listed species can be allowed if it is incidental to an otherwise lawful activity and must be permitted in accordance with Section 7 or 10 of the ESA. Any take of a federally-listed species or its habitat without the required take permit (or allowance) from the USFWS is a violation of the ESA.

Recommendation: The USFWS should be contacted for species occurrence data, guidance, permitting, survey protocols, and mitigation for federally listed species. For the USFWS rare species lists by county please visit the USFWS Information for Planning and Consultation (IPaC) webpage.

Clean Water Act

Section 404 of the Clean Water Act (CWA) establishes a federal program to regulate the discharge of dredged and fill material into the waters of the U.S., including wetlands. The U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency are responsible for making jurisdictional determinations and regulating wetlands and other waters under Section 404 of the CWA.

Wetland mitigation is out-of-kind and insufficient to compensate for impacts to stream functions. For unavoidable stream impacts, stream compensation is required under 33 CFR §332.3(e)(3); item 11.B.2. in Compensatory Mitigation for Losses of Aquatic Resources (73 Federal Register 19596, April 10, 2008); and the Galveston District Stream Condition Assessment Standard Operating Procedure for Compensatory Stream Mitigation.

Recommendation: TPWD recommends consulting with the USACE for potential impacts to waters of the U.S. including jurisdictional determinations, delineations, and mitigation.

State Laws

Parks and Wildlife Code – Chapter 64, Birds

Texas Parks and Wildlife (TPW) Code Section 64.002, regarding protection of nongame birds, provides that no person may catch, kill, injure, pursue, or possess a bird that is not a game bird. TPW Code Section 64.003, regarding destroying nests or eggs, provides that no person may destroy or take the nests, eggs, or

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young and any wild game bird, wild bird, or wild fowl. TPW Code Chapter 64 does not allow for incidental take and; therefore, is more restrictive than the MBTA.

Recommendation: Please review the *Federal Law: Migratory Bird Treaty Act* section above for recommendations as they are also applicable for Chapter 64 of the TPW Code compliance.

Parks and Wildlife Code, Section 68.015

Section 68.015 of the Parks and Wildlife Code regulates state listed species. Please note that there is no provision for the capture, trap, take, or kill (incidental or otherwise) of state-listed species. A copy of *TPWD Protection of State-Listed Species Guidelines*, which includes a list of penalties for take of species, can be found online at the TPWD Wildlife Habitat Assessment Program: Laws and Regulations Applicable to TPWD Review webpage. State-listed species may only be handled by persons with authorization obtained through TPWD. For more information on this authorization, please contact the Wildlife Permits Office at (512) 389-4647.

TPWD provides online access to state-listed species information through the TPWD Rare, Threatened, and Endangered Species of Texas (RTEST) application. This application provides county-level information regarding occurrence of protected species (federal- or state-listed threatened or endangered) species and may be utilized to inform development project planning. Additionally, records of occurrence for these protected species are tracked within the Texas Natural Diversity Database (TXNDD) and are publicly available by request.

Recommendation: The TXNDD is updated continuously. As the project progresses and for future projects, please request the most current and accurate information at TexasNatural.DiversityDatabase@tpwd.texas.gov.

Recommendation: TPWD recommends a biological monitor be present during construction to relocate state-listed threatened species, if found. If the presence of a biological monitor during construction is not feasible, state-listed threatened terrestrial species observed during construction should be allowed to safely leave the site or be relocated by a TPWD-permitted individual to a nearby area with similar habitat that would not be disturbed during construction. TPWD recommends that any translocations of reptiles be the minimum distance possible and no greater than one mile, preferably within 100-200 yards from the initial encounter location. For purposes of relocation,

surveys, monitoring, and research, terrestrial state-listed species may only be handled by persons authorized through the TPWD Wildlife Permits Office.

Recommendation: TPWD recommends reporting observations of threatened species to the TXNDD. These observations can be reported by completing and submitting a TXNDD reporting form which can be found online at the Texas Natural Diversity Database: Submit Data webpage. The TXNDD can be contacted at TexasNatural.DiversityDatabase@tpwd.texas.gov or (512) 389-8744.

Recommendation: To aid in the scientific knowledge of a species' status and current range, TPWD encourages reporting encounters of state-listed species (as well as rare species and federally-listed species) to the TXNDD according to the data submittal instructions found at the TPWD Texas Natural Diversity Database: Submit Data webpage.

Species of Concern

In addition to state and federally-protected species, TPWD tracks special features, natural communities, and rare species that are not listed as threatened or important to evaluate and, if necessary, minimize impacts to rare species and their habitat to reduce the likelihood of endangerment and preclude the need to list. These species and communities are tracked in the TXNDD.

Please note that the absence of TXNDD information in an area does not imply that a species is absent from that area. Given the small proportion of public versus private land in Texas, the TXNDD does not include a representative inventory of rare resources in the state. Although it is based on the best data available to TPWD regarding rare species, the data from the TXNDD do not provide a definitive statement as to the presence, absence or condition of special species, natural communities, or other significant features within your project area. These data are not inclusive and cannot be used as presence/absence data. This information cannot be substituted for on-the-ground surveys. The TXNDD is updated continuously. As the project progresses and for future projects, please request the most current and accurate information at TexasNatural.DiversityDatabase@tpwd.texas.gov. Determining the actual presence of a species in a given area depends on many variables including daily and seasonal activity cycles, environmental activity cues, preferred habitat, transiency and population density (both wildlife and human). The absence of a species can be demonstrated only with great difficulty and then only with repeated negative observations, taking into account all the variable factors contributing to the lack of detectable presence.

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Recommendation: If encountered during construction, measures should be taken to avoid impacting all wildlife.

Recommendation: TPWD recommends reporting observations of rare species to the TXNDD. These observations can be reported by completing and submitting a TXNDD reporting form which can be found online at the Texas Natural Diversity Database: Submit Data webpage. The TXNDD can be contacted at TexasNatural.DiversityDatabase@tpwd.texas.gov or (512) 389-8744.

Thank you for considering potential impacts to Texas' wildlife and natural resources during project planning. Please contact me at (361) 412-9012 or Rachel.Lange@tpwd.texas.gov if you have any questions.

Sincerely,



Rachel Lange
Wildlife Habitat Assessment Program
Wildlife Division

RL: 40329